EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

90-469

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

MARIO L. BEJASA, JR., Petitioner,

v.

UNITED STATES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARIO L. BEJASA, JR.
Petitioner Pro se
25 Shorthill Road
Forest Hills, NY 11375
Tel. No. (718) 575-8021

QUESTIONS PRESENTED

1. Whether or not the refusal of the trial judge to permit Leon Rosen to testify for the defense amounted to a gross abuse of judicial discretion resulting in the denial of his right to substantive and procedural due process protected by the U.S. Constitution.

2. Whether or not the denial by the trial judge of the defense's request to further cross-examine Valdez on newly-produced evidence likewise constituted a grave abuse of judicial discretion, resulting in the denial of the accused's right to confront witnesses against him as guaranteed by the U.S. Constitution.

3. Whether or not the actuations of the judge in the conduct of the trial amounted to an undue and unreasonable interference or restraint in the presentation of the evidence for the accused or otherwise so prejudiced his substantial rights as to

have deprived him of his rights to an adequate and reasonable opportunity to present evidence to confirm his innocence and to a fair and impartial trial guaranteed by the U.S. Constitution.

4. Whether or not a verdict of guilt by a jury is a valid basis for a conviction where such verdict rests exclusively upon the discredited and conflicting testimony of prosecution witnesses, while the accused has in his favor the constitutional presumption of innocence, supported by uncontradicted and convincing evidence.

TABLE OF AUTHORITIES
(In Alphabetical Order)

Table of Contents

STATUTES

U.S. Constitution:

U.S. Code:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. _____

MARIO L. BEJASA, JR., Petitioner,

v

UNITED STATES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

To the honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

MARIO L. BEJASA, JR., the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 23, 1990.

OPINIONS BELOW

The May 23, 1990 opinion of the Court of Appeals is unreported and is reproduced in Appendix A hereof, infra, page 1. The prior opinion of the United States Dis-

trict Court for the Southern District of New York, reproduced as Appendix B, infra, at page 22, is also unreported.

JURISDICTION

The judgment of the District Court (Appendix B, infra, page 22) was entered on December 18, 1989. The jurisdiction of the Supreme Court is invoked pursuant to 28 USC § 2101 (c).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth and Fourteenth amendments to the Federal Constitution which provide as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury, except in cases arising in the land or naval forces, on in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, **without due process of law;** nor shall private property be taken for public use, without just compensation." (Fifth Amendment)
>
> "In all criminal prosecutions,

the accused shall enjoy the right to a speedy and public trial, by an **impartial jury** of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; **to be confronted with the witnesses against him;** to have **compulsory process for obtaining witnesses in his favor,** and to have the Assistance of Counsel for his defense." (Sixth Amendment)

"Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law;** nor deny to any person within its jurisdiction the equal protection of the laws." (14th Amendment; Emphasis supplied)

STATEMENT OF THE CASE

This case is a prosecution for alleged violations of §§2, 371, 1001, and 1505 of Title 18, U.S.C. The Indictment originally charged that the accused, acting in concert with the principal witness Godwin Valdez and the other de-

fendants, **willfully** committed felonious acts amounting to a conspiracy to defraud the U.S. Immigration & Naturalization Service, and in furtherance of such conspiracy, **knowingly** making false statements and using false documents and **willfully** obstructing and/or impeding the administration of proceedings before the U.S. Immigration & Naturalization Service. This conspiracy allegedly involved numerous aliens. Subsequently, the indictment was amended at the government's instance, to reduce the charges to include only two aliens but the amendment was crafted to maintain the number of counts at five.

Both the original and the superseding indictment charged that the accused committed the alleged felonies "willfully" and "knowingly", thus making intent to commit the crimes charged an essential element of the offense, to be proved beyond reasonable doubt.

Prior to the trial, the accused

sought evidence within the prosecution's control which the accused could use in his defense, such as statements made by Valdez when the latter was arrested in Miami for falsely claiming to be a U.S. citizen and using a false U.S. passport to enter the United States. Such documents would have shown that at no time during the approximately two and a half years that Valdez was under investigation for or cooperating with the INS in its inquiry into marriage fraud was the alleged involvement of the accused in the marriage scam ever mentioned. This situation abruptly changed when Valdez was transferred from his Miami jail cell where he spent a few months in incarceration to the Metropolitan Correction Center in New York City, at the instance of the U.S. Attorney's office, working with local INS officers.

These statements were withheld from the defense until **after** Valdez had finished testifying. Upon receipt of such

material, the accused promptly sought leave to further cross-examine Valdez on such statements to, first, show his absolute unreliability or untrustworthiness as a witness against the accused, and second, to establish through this witness a solid basis for, or at least confirm, the defense theory of a frame up, from Valdez' inexplicable silence about defendant's alleged involvement in the scheme in such prior statements. Unfortunately, the judge in grave abuse of its discretion denied such application, thereby rendering ineffective his fundamental right to cross-examine witnesses against him and to present evidence on his behalf. Consequently, he was unable to secure corroboration (independent of his testimony) of such defense theory with the use of the suppressed statement, and eventually, to convince the jury of Valdez' evil scheme with INS officers to implicate the defendant. Due to such failure, Valdez succeeded

in the trial court.

As one of the defense witnesses, the accused offered Leon Rosen, an attorney with an extensive and lengthy practice in the field of immigration law. His testimony would have enlightened the members of the jury on how business in the office of an immigration lawyer is conducted, the professional responsibilities of an immigration practitioner under situations such as those involved in the case, and the consequences of the defendant's cooperation with the INS, if he had chosen to fabricate evidence against Valdez, on his wife's immigration case. It would have provided considerable support to the defense theory that the accused could have acted the way he did without any knowledge of the objective of the conspiracy and that the defendant had acted properly under the circumstances. The inability of the defense to present him as a witness seriously undermined its ability to de-

flect the generally conceded negative opinion of lawyers held by the public in general and to overcome the damaging testimony given by the witnesses for the government. The defendant also thereby failed to apprise the jury that he would have testified against Valdez and Clemente, if he know about the conspiracy. He had everything to gain and nothing to lose by cooperating with the INS. It was obvious that the only reason why he refused to give false testimony was because he was decent enough not to incriminate someone, not even the likes of Valdez and Clemente, on such falsehood.

Furthermore, the judge conducted the trial in such fashion as to reasonably mislead the members of the jury into believing that the Court was convinced of the guilt of the accused. Thus, the judge's sua sponte interruptions of the testimony of the witnesses, his overactive participation in the examination of

witnesses and overtly anti-defendant tone of questioning clearly created an impression in the minds of the jurors that the judge believed the defendant to be guilty. In reaching their verdict, the jurors simply conformed to such perception.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted because the Court of Appeals has rendered a decision in conflict with decisions of this Court and other federal Court of appeals on the same matter, and had sanctioned the departure of a lower court from the accepted and usual course of judicial proceedings. As a necessary consequence of such errors, the defendant's fundamental rights protected by, among others, the Fifth, Sixth and Fourteenth Amendments of the Federal Constitution, were thereby rendered meaningless, calling for the exercise of this Honorable Court's power of supervision.

1. Disallowance of defense witness.

Defendant was unjustly denied his fundamental rights to the due process of law and to compulsory process when the trial court arbitrarily refused to allow his witness Leon Rosen to give testimony favorable to the defense. "The Due Process clause assures the accused right to introduce into evidence any testimony or documentation which would tend to prove his theory of case." Vipperman v. State (1980) 96 Nev 592, 614 P2d 532. Furthermore, "fundamental fairness and due process require that a defendant be given opportunity to call witnesses to refute the prosecution's position." Edge v. State (1981, Miss) 393 So 2d 1337. To improperly exclude evidence and testimony offered by defendant as rebuttal to essential element of crime charged "denies defendant full evidentiary hearing and deprives him of right to fair trial." State v. Fish (1980, Mont) 621 P2d 1072, later app (Mont) 649

P2d 1331. "Although due process does not require all relevant evidence to be received nor prohibit refusal of highly prejudicial albeit relevant evidence, relevance, and not prejudice, is touchtone of due process, and this is especially urgent where evidence in question might tend to prove innocence." State v. Ray (1982, Mo) 637 SW2d 708) Right of accused to have compulsory process for obtaining witnesses in his favor, guaranteed in federal trials by Sixth Amendment, is so fundamental and essential to fair trial that it is incorporated in due process clause of Fourteenth Amendment, so as to be applicable in state trials. Washington v. Texas (1967) 388 U.S. 14, 18 L Ed 2d 1019, 87 S Ct 1920, on remand (Tex Crim) 417 SW2d 278.

As a result of such denial, the jury failed to fully appreciate facts favorable to the accused upon which the proferred witness would have testified. Thus such

facts as: (1) a lawyer commits no wrong in counseling parties or witnesses about the scope of inquiry at a hearing (such as an immigration interview) wherein they may be called upon to give oral testimony; (2) that it is the duty or responsibility of the lawyer to assist the Court in the determination of the true facts, by preparing for the said hearing by interviewing witnesses prior to the said hearing, as long as by doing so, he does not alter the facts constituting the testimony or he does not counsel them to lie in the course of their testimony, or otherwise engage in any other unethical or unprofessional conduct resulting in the tampering of the evidence; (3) that a lawyer working in an average law office specializing in immigration law could have performed the acts complained of without any actual, constructive or reasonably presumptive knowledge of the existence and/or purpose of the alleged conspiracy; (4) that it is not

uncommon among aliens to mislead attorneys, or withhold relevant information from their lawyers about personal lives, or to otherwise suppress information which would put them in a bad light; (5) that despite steps taken to prevent such situations, he himself, an experienced immigration attorney, in the course of his extensive practice may have been misled into representing couples whose marriage prima facie appeared to be genuine, but that sometime after the visa interview, such marital relationship turned out to be questionable; and (6) that had defendant cooperated with the INS in its investigation of Valdez by falsely testifying on facts he had no personal knowledge of, his wife would receive favorable treatment in her deportation case, in about the same way that Dayao, Paredes and Valdez did for testifying against the accused. All these facts were prevented by the judge from being appreciated by the jury in the

determination of his innocence or guilt, leaving the accused without any recourse to such evidence. This failure of the trial judge to afford the accused reasonable leeway in the presentation of evidence supporting his defense becomes even more vital in this case because from the proof adduced by both sides, the question of guilt or innocence eventually boiled down to the credibility of the witnesses. The defendant's liberty therefore hinged solely on the meticulously complex evaluation of pieces of evidence for the prosecution which are wholly unreliable.

Under the Sixth Amendment right of compulsory process, "defendant has general right to place on stand any witness who is physically and mentally capable of testifying to events that witness had personally observed, and whose testimony would have been relevant and material to defense". Washington v. Texas (1967), 388 U.S. 14, 18 L Ed 2d 1019, 87 S Ct 1920, on

remand (Tex Crim) 417 SW2d 278. Judgment of conviction is unconstitutional where accused is forced to trial without fair opportunity to procure attendance of witnesses. Paoni v. United States (1922, CA3 Pa) 281 F 801. Sixth Amendment right to have compulsory process for obtaining witnesses is violated when state arbitrarily denies defendant opportunity to put on stand witness whose testimony would be relevant and material to his defense. Singleton v. Lefkowitz (1978, CA2 NY) 583 F2d 618, cert den 440 U.S. 929, 59 L Ed 2d 486, 99 S Ct 1266. "Exclusion of relevant exculpatory evidence infringes upon Sixth Amendment right of accused to present witnesses in his own defense; once such right is implicated, state must offer sufficiently compelling purpose to justify practice complained of." Pettijohn v. Hall (1979, CA1 Mass) 599 F2d 476, cert den 444 U.S. 946, 62 L Ed 2d 315, 100 S Ct 308. As applied to criminal trial, "denial of due

process is failure to observe that fundamental due fairness essential to very concept of justice." Lisenba v. California (1941) 314 U.S. 219, 86 L Ed 166, 62 S Ct 280 reh den 315 U.S. 826, 86 L Ed 1222, 62 S Ct 620. Fourteenth Amendment is protection against criminal trials in state courts conducted in such manner as amounts to disregard of fundamental fairness and in way that necessarily prevents fair trial, but does not provide review of mere error in jury verdicts. Lyons v. Oklahoma (1944) 322 U.S. 596, 88 L ed 1481, 64 S Ct 1208, reh den 323 U.S. 809, 89 L Ed 645, 65 S Ct 26. A "chance to be heard in trial of issues raised by that charge, if desired, is constitutional right of every accused in criminal proceeding in all courts, state or Federal." Cole v. Arkansas (1948) 333 U.S. 196, 92 L Ed 644, 68 S Ct 5614, 21 BNA LRRM 2418, 14 CCH LC Sec. 51261, on remand 214 Ark 387, 216 SW2d 402, 23 BNA LRRM

2334, Affd 338 U.S. 345, 94 L Ed 155, 70 S Ct 172, 25 BNA LRRM 2100, 17 CCH LC Sec. 65446. "Failure to accord accused fair hearing violates even minimal standards of due process." Irvin v. Dowd (1961) 366 U.S. 717, 6 L Ed 2d 751, 81 S Ct 1639, 1 Media L R 1178; Turner v. Louisiana (1965) 379 U.S. 466, 13 L Ed 2d 424, 85 S Ct 546; Groppi v. Wisconsin (1971) 400 U.S. 505, 27 L Ed 2d 571, 91 S Ct 490, conformed to 50 Wis 2d 407, 184 NW2d 88. A person's due process right to reasonable "opportunity to be heard in his defense - right to his day in court - are basic to our system of jurisprudence." Chambers v. Mississippi (1973) 410 U.S. 284, 35 L Ed 2d 297, 93 S Ct 1038. Part of function of due process requirement of notice is to give charged party chance to marshal facts in his defense and to clarify what charges are. Cf. Wolff v. McDonnell (1974) 418 U.S. 539, 41 L Ed 2d 935, 94 S Ct 2963, 71 Ohio Ops 2d 336. Generally, failure of state

court to comply with provisions of state law in its criminal trials is purely matter of local concern and is not reviewable by federal courts under due process clause of Constitution; however, failure of state to afford particular defendant benefit of established procedures under state law may result in denial of due process when error made by state court renders state proceedings so fundamentally unfair or so fundamentally deficient that they are inconsistent with rudimentary demands of fair procedure. Klimas v. Mabry (1979, CA8 Ark) 599 F2d 842, reh den (CA8 Ark) 603 F2d 158 and revd on other grounds 448 U.S. 444, 65 L Ed 2d 897, 100 S Ct 2755. Trial court's refusal to allow witness to be called denied defendant's rights under Sixth Amendment since witness' testimony was clearly relevant for purpose of direct testimony to establish defense and there was no evidence that defendant chose to

waive right to compulsory process. Pettijohn v. Hall (1979, CA1 Mass) 599 F2d 476, cert den 444 U.S. 946, 62 L Ed 2d 315, 100 S Ct 308.

Right of defendant to present evidence is right which has independent status under Sixth and Fourteenth Amendments; defendant's right to present evidence is violated where state has recognized as relevant and competent testimony of certain type of witness, but has arbitrarily barred its use by defendant. Hughes v. Mathews (1978, CA7 Wis) 576 F2d 1250, cert dismd 439 U.S. 801, 58 L Ed 2d 94, 99 S Ct 43. Thus, this Court has held that "failure to afford such Sixth Amendment guarantees as public trial, impartial jury, notice of charges, or compulsory service can ordinarily be secured by providing those guaranteed in a new trial." Strunk v. U.S. (1973) 412 U.S. 434, 37 L. Ed. 2d 56, 93 S Ct 2260.

2. Denial of cross-examination on newly-

produced evidence.

When the Trial Court prevented the defense counsel from continuing the cross-examination of Valdez regarding the statements the witness made after he was caught in Miami with a false U.S. passport, it effectively nullified the defendant's fundamental rights under the Sixth Amendment of the Constitution which guarantees to an accused the right to be confronted with the witnesses against him, and under the Due Process clause of the Constitution which guarantees a fair hearing before a conviction. In the trial of criminal cases, the "duty of state prosecutor to bring to attention of court or of proper officials all significant evidence suggestive of innocence or mitigation is enforced by requirements of due process". Imbler v. Pachtman (1976) 424 U.S. 409, 47 L Ed 2d 128, 96 S Ct 984 (ovrld on other grounds Harlow v. Fitzgerald, 457 U.S. 800, 73 L Ed 2d 396, 102 S Ct 2727) as

stated in McSurely v. McClellan, 225 App DC 67, 697 F2d 309, 36 FR Serv 2d 349, ALR Fed 1832 (disagreed with Evans v. Dillahunty (CA8 Ark) 711 F2d 828, 38 FR Serv 2d 182.

The Government's failure to disclose this crucial witness' pretrial statement after several requests by defense virtually deprived the accused of a fair and reasonable chance to confront the witness with his previous written statements in which he did not implicate the accused in the conspiracy. It also severely undercut his ability to contradict the witness' testimony which formed the principal basis for the verdict of guilt. Therefore, and contrary to the finding of the Court of Appeals, such circumstance did undermine confidence in the outcome of the trial. The presentation to the jury of the suppressed evidence would have created grave doubt about the witness' truthfulness. It also would have confirmed the defense

theory that this prosecution is nothing but an attempt of the INS to oppress someone it perceived as an uncooperative material witness. Such circumstances would have undoubtedly altered the result of this trial. On the other hand, the absence of such evidence which the accused intended to produce with the aid of the suppressed statement justified the unqualified reliance of the jury on his testimony. Had the witness been confronted with the statement which is inconsistent with his present testimony, the jury would most likely not have believed his testimony in toto.

The Court of Appeals likewise failed to appreciate the fact that the pretrial statement of the witness was never the subject of the cross-examination, because it had not been previously produced. Clearly, the Trial Court was in error in denying the recall of the witness for cross-examination on such newly-produced

evidence, and that the Court of Appeals also erred in sanctioning this departure from the accepted norm of conduct in criminal proceedings. This combination of delay on the part of the government to provide the requested exculpatory evidence and the unreasonable refusal of the Trial Court to allow additional cross-examination of the witness on the new evidence amounted to a "denial of fundamental fairness required by due process clause of Fourteenth Amendment since witness' credibility was most basic issue in case and had jury learned of witness' effort to rehabilitate credibility when confronted with numerous significant inconsistencies between testimony and original statement, witness may have been disbelieved in entirety and defendant found not guilty." Chavis v. North Carolina (1980, CA4 NC) 637 F2d 213, 7 Fed Rules Evid Serv 1243)

A defendant's right to extensive cross-examination of government witness,

designed to reveal bias or prejudice of witness, is compelled by confrontation clause of Sixth Amendment; especially great latitude should be allowed where witness is principal informant. United States v. Alvarez-Lopez (1977, CA9 Cal) 559 F2d 1155, 2 Fed Rules Evid Serv 713) Furthermore, where, as in this case, government's case turns on credibility of witness, "defense counsel must be given maximum opportunity to test credibility of witness and such wide latitude and cross-examination is especially appropriate when key witness is accomplice of accused". Burr v. Sullivan (1980, CA9 Or) 618 F2d 583.

The evidence upon which the accused proposed to question Valdez was concededly material proof. However, they were not, by accident or design, made available by the prosecution to the defendant prior to the conclusion of the testimony of the witness, thereby unfairly but successfully

depriving him of access to such evidence during Valdez' cross-examination. As it turned out, the inability of the accused to bring such facts to light resulted in an unmitigated reliance of the jury upon the testimony of Valdez, who is per se undeserving of faith or credence. Such failure of the prosecution to provide exculpatory evidence to the accused substantially affected the validity of the trial, in that the latter's right to a fair trial under the Due Process clause of the Constitution, as well as other rights guaranteed to the accused by the fundamental law, were violated. Thus, in one case, it had been held that "the prosecution's failure to supply accused with copies of police reports deprived him of his constitutional right to fully confront and cross-examine witnesses against him and requires reversal of conviction". State v. Vigil (1975) 87 NM 345, 533 P2d 578.

This Court has itself held that the

good or bad faith of the prosecution is immaterial, stating that the "suppression by the prosecution of evidence favorable to and requested by accused violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution". Brady v. Maryland (1963) 373 U.S. 83, 10 L Ed 2d 215, 83 S Ct 1194. In still another case, this Court has held that the "prosecution's suppression of evidence, in face of defense production request, violates due process where evidence is favorable to accused and is material either to guilt or to punishment". Moore v. Illinois (1972) 408 U.S. 786, 33 L Ed 2d 706, 92 S Ct 2562, reh den 409 U.S. 897, 34 L Ed 2d 155, 93 S Ct 87. This Court has further held that to guarantee the right of the accused to a fair trial under the due process clause of Fourteenth Amendment, the "**prosecutor has constitutional duty to volunteer exculpatory matter to defense**".

United States v. Agurs (1976) 427 U.S. 97, 49 L Ed 2d 342, 96 S Ct 2392. (Emphasis ours)

When prosecutor suppresses pretrial statements that are material to defense preparation, "nondisclosure is considered at least prejudicial and perhaps violation of due process." People v. Hayward (1980) 98 Mich 332, App 296 NW2d 250. Since suppression or destruction of relevant discoverable material constitutes violation of due process, "Court must impose appropriate sanctions in order to uphold defendant's right to fair trial and to deter prosecution attempts to defy or circumvent judicial authority." People v. Zamora (1980) 28 Cal 3d 88, 167 Cal rptr 573, 615 P2d 1361.

As a direct and necessary consequence of such denial, the accused was prevented from: (1) establishing facts in support of the defense theory that this prosecution is nothing but a malicious attempt on the

part of the INS to punish him for his refusal to fabricate incriminating evidence against Valdez, by asking the witness to, among others, account for such matters as the inexplicable failure of the witness to identify the accused as a member of the conspiracy in such previous statements; (2) further discrediting the testimony of the said witness by showing his established pattern of unreliability or dishonesty and general lack of credibility as a prosecution witness; and (3) eliciting any promise by the government of a reward or leniency to the witness at his sentencing when such statements were made.

Thus, the rule in this jurisdiction is: "In order for cross-examination to be effective, defense counsel must be permitted to expose facts from which factfinder can draw inferences relating to reliability of witness; counsel must be able to make record from which to argue why witness might be biased". United States v. De

Gudino (1983, CA 7 Ill) 722 F2d 1351. Also, "what amount of cross-examination satisfies Sixth Amendment requirement is not measured by quantitative test, but rather by pragmatic, qualitative approach; defendant must be allowed opportunity to expose to jury facts from which jurors, as sole triers of facts and credibility, may appropriately draw inferences relating to reliability of witness". United States v. Berkowitz (1981, CA5 Fla) 662 F2d 1127, 9 Fed Rules Evid Serv 864. In determining whether defendant should be permitted to impeach general credibility of witness with evidence of prior criminal conviction, "Court should consider whom defendant wishes to impeach, importance of that witness' testimony, and whether there is sufficient independent evidence of guilt so that credibility of that witness is not of constitutional dimension." State v. Chaisson (1983, NH) 458 A2d 95. The extent of cross-examination is within sound

discretion of trial judge but "if he excludes testimony which would clearly show bias, interest, favor, hostility, prejudice, promise or hope of reward, he commits prejudicial error and new trial is warranted; test for denial of right to cross-examination is whether defendant has been denied opportunity of presenting to trier of facts information which bears either on issues in case of credibility of witness." State v. McElyea (1981, 130 Ariz 185, 635 P2d 170)

Where cross-examination of key prosecution witness by defendant is cut off in limine with respect to crucial line of questioning concerning witness' bias or motive to testify and her "testimony is of crucial and perhaps determinative importance to prosecution's case, defendant is effectively precluded from examining witness as to her motive for testifying against him in violation of Sixth Amendment's mandate that some meaningful degree

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

of cross-examination be allowed in the first instance." Johnson v. United States (1980, Dist Col App) 418 A2d 136.

We should not lose sight of the fact that Valdez had been shown to have a criminal propensity to distort facts and falsify documents to suit his objectives, using his knowledge of the law as a lawyer, if necessary. If his non-incriminating (to the defendant) statements in Miami were shown to the jury (as opposed to simply mentioning such statements in passing), his testimony against the defendant would have been seriously undermined and would most likely be rejected, resulting in the defendant's acquittal. After all, it is one thing to discuss or hear about a piece of evidence, and still another to view it physically. The jury's appreciation of the evidence is obviously much greater in seeing and reading the actual document.

As matter of fundamental fairness

which due process guarantees an accused, "defendant is entitled to access to relevant material evidence which is necessary for him to prepare his defense; whether defendant has been deprived of this right of due process will depend upon materiality of evidence, likelihood of mistaken interpretation of it by government witnesses or jury, and reasons for its non-availability to defense". United States v. Herndon (1976, CA5 Fla) 536 F2d 1027.

3. The trial judge's conduct.

In addition, the conduct of the trial judge in the course of the trial was apparently misinterpreted by the members of the jury as a perception by the Court of the defendant's guilt and an endorsement of the prosecution's case. Thus, the disallowance of the testimony of the defense witness Leon Rosen, the denial of the defense motion to cross-examine Valdez on the statements made in Miami, the obvious impatience of the Court with the

defense counsel in the cross-examination of the witnesses for the Government and in the course of the presentation of case for the defense, including instances when the judge cut off explanations by defense witnesses to answers given, and other similar occurrences, taken together created a distinct impression which suggested to the jury: "the judge believed the defendant to be guilty, and this is the reason why the judge is hurrying everyone up so as not to waste his and our time on this formality of a trial".

In United States v. Hickman (1979, CA6 Ky) 592 F2d 931, it was held that "where a combination of limitation on cross-examination, antidefendant tone of trial judge's interruptions, and wholesale taking of cross-examination of defense witness by trial judge is such as to leave impression that conduct of trial judge must have left jury with strong impression of judge's belief of defendant's probable

guilt such that it was unable to freely perform its function of independent fact-finder, defendant did not receive fair and impartial trial which Sixth Amendment to Constitution guarantees him". In another case, a District Court's questioning of a defendant imparting message to jury that Court did not believe defendant's testimony and asking defendant to characterize FBI agent's testimony was held to be equivalent to a denial of the defendant's right to a fair trial. United States v. Mazzilli (1988, CA2 NY) 848 F2d 384.

Contrary to the conclusion of the Court of Appeals, the trial judge did not simply make isolated comments or sua sponte interruptions which favored the prosecution and swayed the jury against the accused. The judge's palpable anti-defendant attitude persisted and characterized the presentation of the evidence throughout the trial. To the members of the jury, it was fair to assume that the

judge was taking the cudgels for the prosecution. Thus, on various occasions, the judge blocked questions which the prosecution did not object to, uttered sarcastic remarks or answers to questions asked by defense counsel, and in one instance even denied defense counsel's request for a recess to go to the bathroom, saying out loud for everybody to hear that counsel was "making it up". (Tr. pp. 117, 118)

It has been held that "a trial judge oversteps bounds of propriety and deprives defendant of fair trial in examining defendant and expert witness for defendant in manner more appropriate to prosecutor." Commonwealth v. Hammer (1985) 508 Pa 88, 494 A2d 1054.

For the Court of Appeals to conclude that any possible prejudicial effect may have been made by the trial judge's conduct was cured by the latter's instructions is error because everyone knows that

there is a whole world of difference in saying one thing and in actually doing it. Stated otherwise, action should mirror words because "Actions speak louder than words." These instructions, coming at the conclusion of the presentation of the evidence, were empty and hollow, considering the Judge's conduct of the trial. Besides, it came too late anyway to make an impact, as by that time, the jury had already formed some judgment as to the guilt or innocence of the accused. Such lip service from the Judge, instead of deflecting the unfavorable impression against the defendant, merely served to reinforce the distinct perception by the jury of the defendant's guilt from the judge's obvious endorsement of the prosecution's case.

This Court has held that "procedures employed in state criminal prosecutions sometimes involve such probability that prejudice will result to accused that

despite absence of showing of identifiable prejudice, totality of circumstances may warrant conclusion that procedures are inherently lacking in due process." Sheppard v. Maxwell (1966) 384 U.S. 333, 16 L Ed 2d 600, 86 S Ct 1507, 6 Ohio Misc 231, 35 Ohio Ops 2d 431, 1 Media LR 1220.

II.

Certiorari should also issue to decide an important question of federal law which has not been, but should be, settled by this Court: Whether or not a jury can: [a] deliberately disregard credible and unimpeached defense evidence on record; [b] ignore the presumption of innocence in favor of the accused; and [c] reach a verdict of guilty even if his culpability had not been established by objective evidence beyond a reasonable doubt.

Conviction must rest on relevant and competent evidence.

The evidence upon which the judgment of conviction is based consists exclusive-

ly of impeached testimony given by government witnesses whom the defense had shown to be unreliable, given the numerous false statements they have made in the past, most of them under oath, not to mention their admitted participation in the conspiracy to defraud the government, and their propensity to lie every chance they expected to receive a benefit from such falsehood. Their ulterior motives in testifying against the defendant had been shown and the prosecution does not deny that such cooperating witnesses for the government stood to gain benefits directly or indirectly from such "cooperation". This is not to mention the fact that the stories of the witnesses conflicted in material detail, as when Paredes stated that Valdez did not introduce him to the defendant or tell him that the defendant was going to take care of his case, (Tr. p. 240) directly contradicting Valdez' statement to that effect, and included

inherently improbable situations, as when Dayao testified that upon arriving at the law office of Valdez and not finding him there, witness testified that he immediately announced to defendant, a perfect stranger whose relationship to the office was not yet determined and who could have been a law enforcement officer visiting that location, that he wanted to obtain a "paper divorce" from his wife to be able to marry a U.S. citizen and get a green card, adding that he will continue to live with his wife and would not live with the U.S. citizen spouse. (Tr. p. 278)

On the other end of the scale is: [a] the unimpeached testimony of the defendant, [b] those of his character witnesses who described him as a hardworking lawyer who had worked numerous times as pro bono legal adviser for the Association of the Bar of the City of New York, among others, and a responsible family man, and [c] the presumption of innocence guaranteed by the

due process of law provision under the Constitution to all persons accused of a crime. Altogether, the evidence for the accused adequately confirmed his claim of innocence, and established a widely-regarded and unblemished reputation for honesty or truthfulness, and the remote possibility of his having participated in or consented to the alleged felonious activities.

An examination of the evidence given at the trial would show that various circumstances directly relating to the guilt or innocence of the accused were left unanswered. For one, the essential element of motive on the part of the defendant to participate in the fraudulent scheme was never established. It is also evident that several disturbing and gnawing questions about the defendant's participation in the scheme were left unanswered at the conclusion of the trial. These are: Assuming, arguendo, that the

defendant was guilty:

[a] Why did he not share in the profits of the conspiracy?;

[b] Why did his participation begin when Valdez left the United States and terminate after the return of Valdez?;

[c] If he was a part of the conspiracy, why did he not continue representing the more than ten other aliens who came after Paredes and Dayao?;

[d] Why did both Paredes and Dayao insist in their written statements that Valdez is their lawyer and at the trial changed their position, this time promptly identifying the defendant as <u>one of [their] lawyers?</u>;

[e] The attorneys who represented Dayao at the immigration interview, and those who handled the other cases later "referred" by the conspiracy, did they know about the fraudulent scheme? If so, why were they not prosecuted - was it because they did not know about the crimi-

nal scheme or was it because even if they were guilty, the INS had no interest in their prosecution?;

[f] If these lawyers who came to the scene later did not need to know about the fraud, why did the defendant who was in exactly the same situation have to know?

[g] If indeed Valdez told the accused about the objective of the conspiracy, why did he not do the same with Wang, the other lawyer in the office?

[h] Is it not more reasonable to assume that Valdez did not tell the defendant because he would have asked for a share in the $ 5,000 "processing fees" paid by the aliens, or at least an increase of his measly $ 200 to $ 300 weekly salary as a lawyer?

[i] If the defendant knew about the existence of the conspiracy or its objective, why would he not testify against Valdez?

[j] Would not the defendant, an immi-

gration practitioner, jump at the chance or invitation to cooperate with the INS? If he did, he would be killing three birds with one stone, so to speak: first, he would be able to gain considerable concessions in the future to enhance his law practice; second, he would also thereby ensure INS' favorable action on his wife's immigration case; and third, at the same time, he would have altogether evaded criminal liability by seeking immunity for his participation in the conspiracy.

[k] It is fair to assume that a person who had committed a crime in the past and was able to evade prosecution therefor would be encouraged to commit a similar crime in the future. Undeniable proof of this proposition is Valdez who continued in his career of immigration marriage fraud and document falsification for material or personal gain after he succeeded in his first attempt; Clemente who was involved in other criminal activi-

ties even after the discovery of the fraudulent marriage conspiracy; and Paredes who perjured himself again before the American Consul in Manila when he applied for his immigrant visa through his real wife.

Why then did the INS fail to show similar criminal behavior on the part of the defendant subsequent to the cases subject of this prosecution?

[l] Why would a lawyer who had previously succeeded in committing immigration marriage fraud be interested in rendering free legal assistance to persons who will not pay him a single penny for the valuable service he will provide that his paying clients willingly spend hundreds or thousands of dollars for?;

[g] Why, in the period of more than three years that Valdez was under investigation for involvement in marriage fraud and until Valdez' transfer to a New York jail from Miami, was the defendant's

involvement in the conspiracy never mentioned, unlike Arnold Clemente whose name repeatedly cropped up in each statement?

[n] Why would the INS intentionally refrain from prosecuting Dayao and Paredes who were principal participants in and immediate beneficiaries of the activities of the conspiracy, solely to pursue the prosecution of a person whose involvement in the marriage fraud scheme is marginal at best? It is unbelievable, to say the least, that these two principal co-conspirators not only evaded prosecution - they were even permitted by the government to benefit from their crime and were handsomely rewarded by the INS, i.e. Paredes was allowed to retain his second green card, and Dayao was permitted to remain in the country indefinitely, in return for their "cooperation" in this malicious persecution of the defendant whose singular fault was that he dared to refuse to participate in an unlawful

scheme to fabricate false evidence to convict Valdez, who turned into his principal accuser. This is a disgrace and a travesty of justice, nothing short of a situation in which the FBI, another division of the Department of Justice, strikes a deal with a high-ranking mob figure to be able to bring a lowly soldier of the crime family before the bars of justice through lies, deceit, and corruption of evidence; and

[o] In law, flight from prosecution is an evidence of guilt, and it is said that the innocent stands like a lion to face the accusation. We already know that Valdez proved this doctrine true when he ran away to the Philippines in December 1987 (Tr. 183, 184). He was actually returning to this country surreptitiously when he was arrested in Miami. The defendant on the other hand stood firm and met the prosecution's blows head on, with credible evidence confirming his inno-

cence. He did not even make any attempt to shield himself with the protective cloak offered by the Fifth Amendment. It would have been most logical, if he were truly guilty, to flee from prosecution, considering: first, that the witnesses against him would surely implicate him as part of their cooperation agreement, and second, he cannot expect and surely will never receive any favorable treatment from the INS for his wife in her deportation case. She then would most likely be deported, in view of his adamant refusal to testify falsely in the investigation of Valdez. His life in the United States in such a situation is over, and he would not stand to benefit by not fleeing. The fact that he stood his ground is nothing less than an unmistakable statement that he has nothing to fear because he is innocent. Unfortunately, the jury, in its haste to return to their normal lives outside the courtroom, failed to properly appreciate

these circumstances favorable to the accused.

Defendant submits that the doubt entertained by the fact-finder from these set of facts should have been resolved in favor of the accused, consistently with the constitutional presumption of innocence. Why the jury ignored otherwise credible, unrebutted evidence and the presumption of innocence in favor of the accused will never be known. Suffice it to say that such disregard for fundamental rights and convincing evidence has no place in a society as long as Law, Order and Justice govern the conduct of its citizens.

Said this Court in In re Winship, (1970) 397 U.S. 358: "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for

the presumption of innocence - that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law', Id. at 363. In many past cases, this standard was assumed to be the required one (See Miles v. United States [1881] 103 U.S. 304; Davis v. United States [1895] 160 U.S. 469, 488; Holt v. United States [1910] 218 U.S. 245, 253; Speiser v. Randall, [1958] 357 U.S. 513, 525-526), but because it was so widely accepted only recently has the Court had the opportunity to pronounce it guaranteed by due process. Id. The presumption of innocence is valuable in assuring defendants a fair trial (See Deutch v. United States [1961] 367 U.S. 456, at 471), and it operates to ensure that the jury considers the case solely on the evidence." Holt v. United States (1910) 218 U.S. 245; Agnew v. United States, (1897) 165 U.S. 36.

In Jackson v. Virginia (1979) 443

U.S. 307, this Court held that "a conviction which is not supported by any relevant evidence cannot be sustained under the due process clause of the Constitution." Quoting Thompson v. Louisville, 362 U.S. 199, it further held that "A meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused. Accordingly, we held in the Thompson case that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. The 'no evidence' doctrine of Thompson v. Louisville thus secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty." Citing In re Winship, supra, this Court continued: "The standard of proof beyond a reasonable doubt, said the Court, 'plays a vital role in the

American scheme of criminal procedure' because it operates to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. 397 U.S. 358, at 363. The due process clauses of the Fifth and Fourteenth Amendments protect the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (Id., at 364) At the same time, by impressing upon the factfinder the need to reach a subjective state of near certitude as to guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanctions and thus to liberty itself. Id., at 372 [Harlan, J., concurring]."

One of the rightful boasts of Western Civilization is that "the [prosecution] has the burden of establishing guilt

solely on the basis of evidence produced in Court and under circumstances assuring an accused all the safeguards of a fair procedure." Irvin v. Dowd, 366 U.S. 717, at 729 (concurring opinion) "Among these is the presumption of the defendant's innocence." Deutch v. United States (1961) 367 U.S. 456, citing Sinclair v. United States, 279 U.S. 263, at 296, 297; Cf. Flaxer v. United States, 358 U.S. 147, at 151.

Federal courts, on direct appeal of federal convictions or collateral review of state convictions, must satisfy themselves whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. The question the reviewing court is to ask itself is not whether it believes the evidence at the trial established guilt beyond reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt." (Ibid., at 316, 318, 319)

Defendant humbly submits that the prosecution miserably failed in its duty to prove by credible evidence the defendant's culpability beyond reasonable doubt, and that the reversal of the judgment of conviction by the Trial Court under the premises is proper.

CONCLUSION

WHEREFORE, petitioner respectfully prays for the issuance of a writ of certiorari.

Such other and further measures of relief as may be just and proper under the circumstances are likewise prayed for.

Respectfully submitted.

Forest Hills, N.Y., for Wash., D.C.

September 3, 1990.

MARIO L. BEJASA, JR.
Petitioner Pro se
25 Shorthill Road
Forest Hills, NY 11375
Tel. No. (718) 575-8021

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 1221--August Term, 1989

Argued May 11, 1990 - Decided May 23, 1990

Docket No. 90-1014

UNITED STATES OF AMERICA,
Appellee,

versus

MARIO BEJASA, JR.,
Defendant-Appellant.

Before:

ALTIMARI and MAHONEY, Circuit Judges,

and POLLACK, Senior District Judge.*

Appeal from judgment of the District Court, Southern District of New York (Charles M. Metzner, Judge), of conviction for conspiring to defraud the United States and the United States Department of Justice, Immigration and Naturalization Service ("INS"), to file false statements with the INS and to obstruct INS proceedings, in violation of 18 U.S.C. § 371;

*Honorable Milton Pollack, Senior United States District Judge for the Southern District of New York, sitting by designation.

knowingly preparing and filing false forms with the INS in violation of 18 U.S.C. §§ 2, 1001; and knowingly obstructing INS proceedings, in violation of 18 U.S.C. §§ 2, 1505. Defendant-appellant claims that the Government improperly denied access to prosecution witnesses, that the Government improperly failed to produce certain allegedly exculpatory impeachment material, and that the trial court's conduct in the questioning of witnesses and sua sponte interruptions improperly swayed the jury against defendant-appellant.

Held, access to prosecution witnesses not improperly denied, no bias from inadvertently delayed disclosure of allegedly exculpatory impeachment material, and no bias from trial court's conduct.

AFFIRMED.

OTTO G. OBERMAIER, United States Attorney for the Southern District of

New York, N.Y. (Nancy Northup, Kerri Martin Bartlett, Assistant United States Attorneys, of Counsel), for Appellee.

MILLER, CASSIDY, LARROCA & LEWIN, Washington, D.C. (Nathan Lewin, Deborah Bradley Clements, of Counsel), for Defendant-Appellant Mario Bejasa, Jr.

Milton Pollack, Senior District Judge.

Defendant-appellant Mario Bejasa, Jr., appeals from a judgment of conviction entered in the Southern District of New York (Metzner, J.) on December 18, 1989. Bejasa was convicted by a jury following a four-day trial on five counts of conspiring to defraud the United States and the United States Department of Justice, Immigration and Naturalization Service ("INS"), to file false statements with the INS, and to obstruct INS proceedings, in violation of 18 U.S.C. § 371; of knowingly

preparing and filing false forms with the INS, in violation of 18 U.S.C. §§ 2, 1001; and of knowingly obstructing INS proceedings, in violation of 18 U.S.C. §§ 1505. Subsequent to the conviction, the Court suspended imposition of sentence on all five counts and placed Bejasa on concurrent three-year terms of probation, with the special condition that he perform 100 hours of community service. In addition, the Court assessed a $ 10,000.00 fine. Bejasa is currently serving his term of probation.

Bejasa contends on appeal that he did not receive a fair trial on the grounds that the government blocked access to witnesses and failed to produce certain exculpatory impeachment material and on the ground that the trial judge allegedly improperly swayed the jury against defendant by his so-called sua sponte interruptions.

BACKGROUND

Bejasa is a Filipino lawyer who came to New York in 1980 and who, according to his testimony, was admitted to practice law in New York in February 1983. In April 1983, Bejasa was hired by Godwin Valdez for his law office, where Bejasa was paid $ 200 - 300 per week.

Valdez was arrested in 1988 for entering the United States with a fraudulent American passport. As part of his subsequent cooperation with the Government, Valdez implicated Bejasa, Arnold Clemente (as a co-conspirator) and others in a scheme to defraud the United States and the INS by obtaining "sham" divorces and marriages for Filipinos in the United States who sought permanent resident alien status (a "green card"). Indictment S 88. Cr. 967 was filed on August 31, 1989, charging Bejasa with five counts, including conspiracy to defraud the United States and INS, knowingly preparing false

INS forms, and knowingly obstructing INS proceedings.[1]

At trial, the Government presented evidence regarding two main transactions:

In November 1983, Anthony Paredes entered the United States on a one-month visitor's visa with his wife. He subsequently contacted Clemente about changing his immigration status. Clemente informed Paredes about a sham divorce/marriage procedure and for $ 5,000 agreed to ar-

---

[1] That indictment superseded Indictment 88 Cr. 967, which was filed on December 21, 1988. Arnold Clemente pleaded guilty to Count One of Indictment 88 Cr. 967 on April 18, 1989, before the Honorable Pierre N. Leval, United States District Judge. On August 1, 1989, Judge Leval suspended execution of the one-year sentence he had imposed on Clemente and placed Clemente on probation for four years, with the special condition that he perform 400 hours of community-service. Judge Leval also imposed a $ 500.00 fine. After signing the cooperation agreement with the Government, Godwin Valdez pleaded guilty to Count One of Indictment 88 Cr. 967 on January 6, 1989, before Judge Leval. On December 1, 1989, Judge Leval suspended the sentence he had imposed and placed Valdez on probation for two years.

range a new marriage to a pliant American citizen. He then accompanied Paredes to Valdez' law firm where Paredes met with Valdez. Valdez testified that during this meeting he called Bejasa in, told him about the scheme and told him that he wanted Bejasa to handle the legal work for Paredes. Valdez subsequently prepared the papers for a divorce of Paredes from his wife, Lourdes Paredes, with falsified addresses and grounds for divorce. On March 19, 1984, Bejasa prepared and notarized a supplemental affidavit for the divorce action which contained false statements. After Paredes was married to his American "wife", Christina Chaj, the evidence indicates that he continued to live with his ex-wife Lourdes Paredes thereafter; yet Bejasa signed immigration forms which contained false information about Paredes' status. On June 4, 1984, according to Paredes' testimony, Bejasa coached Paredes and Chaj on false answers

for an INS interview.

In April 1984, Daniel Dayao entered the United States on a six-month tourist visa with his wife. Dayao learned from Paredes of the divorce scheme, and, through Paredes, met Clemente, who said that for $ 5,000 he would find Dayao an American wife and a law firm to handle the legal work. In May or June 1984, according to the testimony adduced at trial, Dayao told Bejasa he wanted a divorce to obtain a green card but that he would continue to live with his Filipino wife. According to the testimony, Bejasa agreed to and did prepare his divorce papers, which contained false information. Dayao subsequently married Linda Shugart. On November 15, 1984, Bejasa presented to Dayao immigration papers which had false information for his signature. Dayao however never went through with his INS interview and was never granted resident alien status.

Neither Paredes nor Dayao ever left his former wife. After the INS charade, Paredes divorced his American "wife" and resumed his interrupted marriage with his former wife, and Dayao, at the time of trial, was engaged in the process of reversing his status similarly.

DISCUSSION

In asserting on this appeal that he was not accorded a fair trial, Bejasa makes three primary contentions: (1) that the Government denied him access to the main Government witnesses in the case; (2) that the Government failed to produce certain exculpatory impeachment material for Bejasa's use at trial; and (3) that the trial judge improperly swayed the jury against Bejasa by his comments and questioning during the trial. We will address each contention in turn.

I. Access to Government witnesses.

Prior to trial, Bejasa through his counsel, Jonathan Avirom, sought to inter-

view Paredes and Dayao, two of the Government's primary witnesses against Bejasa. The Government's representatives refused to provide the defense with their phone numbers or addresses. Though Bejasa never sought a court order to mandate production of this information, at the last pretrial conference, one month before the trial, the Government agreed to ask the two witnesses if they wished to speak to defense counsel. The Government's representative stated on the record that he contacted the witnesses "more than once". However, Paredes and Dayao chose not to be interviewed by the defense.

Bejasa argues that because of the vital nature of Paredes and Dayao's testimony he could not properly prepare his defense, including the cross-examinations of those witnesses, without being able to interview them.

Although the government has no

"special right or privilege to control access to trial witnesses" United States v. Hyatt, 565 F.2d 229, 232 (2d Cir. 1977), the Government did not improperly interfere with access here. Fed.R.Crim.P. 16 does not require the Government to furnish the names and addresses of its witnesses in general. It is true that the "district courts have authority to compel pretrial disclosure of the identity of the government witnesses . . ." United States v. Cannone, 528 F.2d 296, 300 (2d Cir. 1975) (emphasis added). However, in the absence of "a specific showing that disclosure was both material to the preparation of [the] defense and reasonable in the light of the circumstances surrounding [the] case," id. (emphasis in original), the district court could not be said to have abused its discretion in not compelling disclosure.

This, however, is not a case in which the Government was withholding the identi-

ties of or access to witnesses whose presence at the trial would surprise the defendant. Here, Bejasa knew who the witnesses would be, had dealt with them before, and presumably, either knew their addresses and phone numbers from his representation of them or could otherwise have contacted them had he attempted with due diligence to do so. Moreover, no "specific showing" of any sort has been made here that disclosure of more than the identities of the witnesses was material to the preparation of the defense; nor did Bejasa ever even seek an order from the Court to compel such disclosure. Rather, he agreed to have the Government contact Paredes and Dayao for him, which it apparently did. Finally, it should be noted that Bejasa's cross-examinations of Paredes and Dayao at the trial were both vigorous and extensive.

II. Disclosure of Impeachment Material

At the inception of trial, Bejasa's counsel noted on the record that Bejasa had not received the file that the INS created on Valdez when he came to Miami using a phony United States passport, a crime to which he has pled guilty and for which he has been sentenced. The defense felt that this file contained information which would impeach the Government's primary witness, Valdez, and was therefore exculpatory. The Government initially indicated that no such file existed with INS in Florida because the case had been handled by the United States Customs Service ("Customs"). The next day, the Court ordered the Government to produce the file whether Customs or INS had it, but cautioned, "I think there are going to be limits to it. I can't tell you until I have the file and go over it." That afternoon, the Government informed the Court that the file, which was in the possession of the INS, was being air delivered from

Florida, but handed over Valdez' sworn post-arrest statement which had previously arrived from the Miami file. The rest of the file did not arrive until after Valdez had testified. At that time, the Court, having examined the file, denied Bejasa's request to put Valdez back on the stand for further cross-examination, finding that the information in the file did not add materially to the previous cross-examination.

The government admits that this file contained exculpatory impeachment evidence which should have been produced pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). However, failure to produce Brady material, when inadvertent as here, does not automatically require reversal. To reverse, the evidence must be "material in the sense that its suppression undermines confidence in the outcome of the trial."

United States v. Bagley, 473 U.S. 667, 678 (1985), i.e. it is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682.

The Government contends, correctly, that there is no reasonable probability that this evidence would have changed the result, because Bejasa had already cross-examined Valdez extensively on the areas contained in the file, namely: his cooperation with the Government; his 1989 conviction for entering the United States using a false United States passport; his 1984 entry using a false Philippine passport, for which he was never arrested; the fraudulent marriages he helped arrange; and his attempt to defraud an insurance company by falsely claiming to have lost some $ 2,000 in traveler's checks. While the Government unquestionably should have produced the evidence in the Miami file

prior to Valdez' testimony, as found by the trial judge, it would have had little or no influence on the result. Therefore, it is not material evidence under the standard announced in Bagley, and the government's inadvertent failure to produce it before Valdez' testimony does not constitute a basis for reversing Bejasa's conviction.

III. Trial Judge's Conduct

"Rarely is there a case reaching us after conviction in which the defendant believes he has received a fair trial. The human tendency to blame a trial judge for the jury's verdict of guilt is a frailty we often encounter, and almost as frequently we find such claims to be without merit or substance. Once again, we are asked by a convicted defendant to consider a claim of improper conduct on the part of a trial judge." United States v. Nazzaro, 472 F.2d 302, 303 (2d Cir. 1973) (revers-

ing conviction of defendant).

Defendant-appellant cites several examples in which Judge Metzner interrupted testimony of Valdez, Paredes and Dayao either to prevent a question which had not been objected to by the Government or to interpret an answer on behalf of a witness. Bejasa contends that, in a case which allegedly hinged almost solely on the Bejasa's credibility as opposed to that of Valdez, Paredes and Dayao, the Court manifested its endorsement of the prosecution's case and improperly swayed the jury against Bejasa. The defendant has far from met the substantial burden of showing reversible error.

Both the Federal Rules of Evidence and the relevant case law make clear that the trial judge may actively participate in a jury trial.. He "need not sit like a 'bump on a log' throughout the trial." United States v. Pisani, 773 F.2d 397, 403 (2d Cir. 1985), reh'g. denied, 787 F.2d 71

(1986). Moreover, the district court has "broad discretion over the scope of cross-examination, and we will not overturn an exercise of that discretion absent a clear showing of abuse." United States v. Bari, 750 F.2d 1169, 1178 (2d Cir. 1984) (citations omitted), cert. denied, 472 U.S. 1019 (1985). This Court will reverse when "it appears clearly to the jury that the court believes the accused is guilty." Nazzaro, 472 F.2d at 303. The vital question is not whether the trial court's conduct left something to be desired but "whether his behavior was so prejudicial that it denied ... appellant[] a fair, as distinguished from a perfect, trial." United States v. Robinson, 635 F.2d 981, 984 (2d Cir. 1980), cert. denied, 451 U.S. 992 (1981). In making this determination, we "can only be guided by the cold black and white of the printed record." United States v. Mazzilli, 848 F.2d 384, 389 (2d

Cir. 1988).

Judges, being human, are not immune to feelings of frustration at the occasional antics or inartfulness of attorneys or impatience at the evasiveness of witnesses. Such feelings may give vent to remarks which, judged in isolation from the totality of the record through the dispassionate looking glass of hindsight, "would better have been left unsaid." Robinson, 635 F.2d at 985. Yet, analysis of such comments, taken out of context of the entire record, is not the proper basis for review. Rather, we must make "an examination of the entire record", Mazzilli, 848 F.2d at 389, in order to determine whether the defendant received a fair trial.

Having carefully scrutinized the entire trial record here, we are convinced beyond peradventure of doubt that Judge Metzner's conduct was not prejudicial to defendant and that Bejasa's trial was

fair. Judge Metzner's inquiries and interpolations complained of assisted in clarification of ambiguities for the benefit of the jury. Cf. United States v. Gurary, 860 F.2d 521, 527 (2d Cir. 1988), cert. denied, 109 S. Ct. 1931 (1989) Moreover, any possible prejudicial effect was cured by Judge Metzner's cautionary instructions.[2]

---

[2]Judge Metzner charged:

> I have sought to avoid my comments which might suggest that I have personal views on the evidence or that I have any opinion as to the guilt or innocence of this defendant. You are not to assume that I have any such feelings or opinions. This charged is given to you solely to instruct you as to the applicable law in this case.
>
> The actions of the judge during the trial in granting or denying motions or ruling on objections by counsel or in statements to counsel or in attempting to clearly set forth the law in these instructions are not to be taken by you as any indication of any determination of the issues of fact. These matters, the actions of the court, relate to procedure and law. You, the members of the jury, determine the facts. Tr. 494.

In sum, none of the defendant-appellant's contentions regarding an unfair trial have merit. Accordingly, we affirm the judgment of conviction entered against Bejasa.

Affirmed.

UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs.

MARIO BEJASA,
s/s 321-70-6231
25 Shorthill Road
Forest Hills, N.Y. 11375,
Defendant.

Date of offense: Fall 1983 up to Jan. 1986

DOCKET NO. (S) 88-00967-03 (CMM)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government JEFF SKLAROFF (AUSA), the defendant appeared in person on this date December 18, 1989

with counsel JONATHAN AVIROM (ESQ).

There being a finding/verdict of guilty.

Defendant has been convicted as charged of the offense(s) of:

COUNT ONE: CONSPIRACY TO DEFRAUD THE U.S. IMMIGRATION & NATURALIZATION SERVICE (INS) (TITLE 18 USC SECTION 371).

COUNTS TWO & THREE: FALSE STATEMENTS. (TITLE 18 USC 1001 &2)

COUNTS FOUR & FIVE OBSTRUCTION OF JUSTICE. (TITLE 18 USC SECTIONS 1505 & 2).

The court asked whether the defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, the court adjudged the defendant guilty as charged and convicted and ordered that: IMPOSITION OF SENTENCE IS SUSPENDED ON COUNTS 1,2,3,4, and 5, AND THE DEFENDANT IS PLACED ON PROBATION FOR A PERIOD OF THREE (3) YEARS ON EACH COUNT TO RUN CONCURRENTLY WITH EACH OTHER, SUBJECT TO THE STANDING PROBATION ORDER OF THIS COURT.

--SPECIAL CONDITIONS--

THAT THE DEFENDANT PARTICIPATE FOR ONE HUNDRED (100)HOURS IN COMMUNITY SERVICE UNDER THE SUPERVISION OF PROBATION DEPT.

--ALSO--

THE DEFENDANT IS TO PAY A FINE IN THE AMOUNT OF $ 10,000.00 DOLLARS, PURSUANT TO TITLE 18 USC SECTION 3013 (a) THE DEFEND-

ANT IS ASSESSED $ 50.00 ON COUNTS 1,2,3,4 and 5. TOTAL ASSESSMENT $ 250.00.

MOTION BY THE DEFENSE COUNSEL TO DISMISS REGULAR INDICTMENT 88-00967003, NO OPPOSITION BY THE GOVERNMENT. MOTION GRANTED.

DEFENDANT IS TO NOTIFY THE ASSISTANT U.S. ATTORNEY OF ANY CHANGE OF ADDRESS.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

s/CHARLES M. METZNER

T/CHARLES M. METZNER(USDJ) Date:12-18-89

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. _____

MARIO L. BEJASA, JR., Petitioner,

v.

UNITED STATES, Respondent.

MOTION FOR LEAVE TO SUBSTITUTE

PETITION FOR WRIT OF CERTIORARI

MARIO L. BEJASA, JR., the petitioner herein, respectfully seeks leave to substitute the attached Petition for A Writ of Certiorari, in lieu of the papers he filed with the Court by mail on August 21, 1990 which, due to inadvertence or excusable error, failed to comply with the Rules of this Honorable Court.

Petitioner's affidavit in support of this motion is attached hereto.

MARIO L. BEJASA, JR.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO SUBSTITUTE PETITION FOR CERTIORARI

I, MARIO L. BEJASA, JR., being first duly sworn, depose and say that I am the petitioner in the above-entitled matter, and that in support of my Motion for Leave to Substitute Petition, I state that:

1. On August 21, 1990, I filed with this Court, by certified mail, forty (40) copies of a Petition for Certiorari, typewritten on 8½" x 11" bond paper.
2. Unfortunately, the payment for the filing fees therefor was inadvertently left out when the package containing the forty copies of the Petition was delivered to the Post Office;
3. When the petitioner discovered the error later in the day, he immediately proceeded to the Post Office and mailed the payment check, along with a copy of the Petition, noting thereon that forty copies of the petition

were mailed earlier by separate cover, and that the payment was for the same petition.

4. On or about August 21, 1990, I received correspondence from the Clerk's Office, indicating that the papers I filed did not conform to the Rules and will have to be printed.

5. The petitioner thereupon solicited quotations from various establishments for the printing of the Petition, and eventually realized that he does not have the financial resources necessary to defray the cost of printing.

6. The petitioner thereupon consulted the Clerk's Office, and decided to submit a typewritten petition which will conform to the Rules.

7. The enclosed petition is being submitted with the minimum of delay.

I understand that a false statement

in this Affidavit will subject me to penalties for perjury.

MARIO L. BEJASA, JR.

STATE OF NEW YORK
COUNTY OF NEW YORK

SUBSCRIBED AND SWORN on September 12, 1990.

ROSELI G. ROSALI
Notary Public, State of New York
Registration No. 4961315
Qualified in New York County
Commission Expires Feb. 5, 1992

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. _____

MARIO L. BEJASA, JR., Petitioner,

v

UNITED STATES, Respondent.

PROOF OF SERVICE

MARIO BEJASA, Jr. being duly sworn hereby depose and say: that he is the petitioner in above-entitled matter; that on September 12, 1990, he served three copies of the petition and the supporting documents thereto by certified mail upon:

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530
Attorneys for the United States

MARIO L. BEJASA, JR.
Affiant

STATE OF NEW YORK
COUNTY OF NEW YORK

SUBSCRIBED AND SWORN on September 12, 1990.

ROSELI G. ROSALI
Notary Public, State of New York
Reg. No. 4961315, New York County
Commission expires Feb. 5, 1992

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990
No. _____

MARIO L. BEJASA, JR., Petitioner,

v

UNITED STATES, Respondent.

NOTICE OF FILING OF PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

To: **SOLICITOR GENERAL**
Department of Justice
Washington, D.C. 20530
Attorneys for the United States

You are hereby notified that a petition for a writ of certiorari in the above-entitled case was filed through the mail today, September 12, 1990 and your office will be advised of the case number as soon as the case is docketed in the Supreme Court of the United States.

September 12, 1990.

MARIO L. BEJASA, JR.
Petitioner Pro Se
25 Shorthill Road
Forest Hills, NY 11375
Tel.No. (718) 575-8021